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FACEBOOK, INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

## FACEBOOK, INC.,

Plaintiff,

V.

POWER VENTURES, INC. a Cayman Island Corporation; STEVE VACHANI, an individual; DOE 1, d/b/a POWER.COM, DOES 2-25, inclusive,

## Defendants.

Case No. 5:08-cv-05780 LHK

## **JOINT CASE MANAGEMENT STATEMENT**

Date: January 11, 2017  
Time: 2:00 P.M.  
Judge: Hon. Lucy J. Koh  
Courtroom: 8, 4th Floor

1        This Court has set a further Case Management Conference for January 11, 2017. Pursuant  
 2 to the Minute Order setting such Case Management Conference [Dkt. No. 402], Plaintiff  
 3 Facebook, Inc. (“Facebook”) hereby submits this Joint Case Management Statement, without  
 4 input from Defendants Power Ventures, Inc. (“Power”) or Steven Vachani (“Vachani”)<sup>1</sup>.

5 **I. JURISDICTION AND SERVICE**

6        On December 19, 2016, the Ninth Circuit issued the mandate associated with its Order  
 7 and Amended Opinion in *Facebook, Inc. v. Power Ventures, Inc.*, No. 13-17154 (9<sup>th</sup> Cir. Dec. 9,  
 8 2016) (“Ninth Circuit Order”). All parties previously were served with all relevant pleadings.  
 9 The parties agree and the Ninth Circuit has concluded that this Court has subject matter  
 10 jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. Facebook asserted various state and federal  
 11 claims against Defendants, including two claims alleging violations of the Computer Fraud and  
 12 Abuse Act, 18 U.S.C. § 1030 *et. seq.* (“CFAA”), and California Penal Code § 502(c), for which  
 13 this Court in two Orders [Dkt. Nos. 275 & 373] previously concluded Defendants were liable.  
 14 Separately, the Court by Order [Dkt. No. 356] also awarded Facebook costs and attorney fees  
 15 from Defendants as a discovery sanction arising from the need to take an additional deposition of  
 16 Power while the matter was pending before this Court. The liability findings by this Court with  
 17 respect to the CFAA and Section 502(c) claims, as well as the discovery sanctions, have been  
 18 affirmed by the Ninth Circuit. The Court’s ruling with respect to the Controlling the Assault of  
 19 Non-Solicited Pornography and Marketing Act of 2003 (“CAN-SPAM Act”) has been reversed.  
 20 Venue is proper under 28 U.S.C. §1391(b).

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24       <sup>1</sup> Facebook on January 3, 2017 forwarded copies of its positions set forth in this Joint Case  
 25 Management Statement to Defendants. However, on January 4, 2017, shortly before the deadline  
 26 to file this Joint Case Management Statement, Facebook was apprised by counsel for Power that  
 27 both Power and Vachani had personal crises that prevented them from preparing and contributing  
 28 Defendants’ portions of this Joint Case Management Statement. Defendants further indicated that  
 they would file a request for ex parte relief seeking a continuance of the Case Management  
 Conference – a request to which Facebook does not object given Defendants’ circumstances.  
 However, Facebook is filing this Joint Case Management Statement without Defendants’  
 contributions due to the fact a continuance has not been granted as of the January 4, 2017  
 deadline set forth in Docket No. 402 (the Court’s December 19, 2017 Minute Order).

1       **II. FACTS**2       **A. Facebook's Position**

3       This Court should enter a revised Judgment and Permanent Injunction in the form set out  
 4       in Facebook's attached proposed Order, whereby Facebook receives an adjusted award of  
 5       \$46,883 in damages from Defendants, jointly and severally, for their violations of the CFAA and  
 6       California Penal Code Section 502(b). This amount of damages, which reflects the damages  
 7       Facebook introduced into the record reflecting expenses incurred internally and via outside  
 8       counsel for the period following December 1, 2008, when Facebook served its cease and desist  
 9       letter on Power. The revised Judgment and Permanent Injunction also include the \$39,796.73  
 10      previously awarded to Facebook against Power and Vachani for discovery abuse, as well as the  
 11      \$49,637.93 in taxable costs awarded to Facebook. Accordingly, the total amount to be awarded  
 12      to Facebook is \$136,317.66, jointly and severally, against Defendants.

13       **B. Facebook's Proposal Conforms to the Ninth Circuit Remand Order**

14       This Court previously entered Orders granting Facebook summary judgment of liability  
 15      [Dkt. No. 275] and awarding Facebook damages from both Defendants in the amount of \$80,543  
 16      for violations of both the CFAA and California Penal Code Section 502(b) [Dkt. No. 373]. The  
 17      Court in two other Orders separately awarded Facebook sanctions from both Defendants in the  
 18      amount of \$39,796.73 for discovery abuse related to a Rule 30(b)(6) deposition and failure to  
 19      produce relevant documents [Dkt. No. 356], and taxed Defendants \$49,637.93 in costs [Dkt. No.  
 20      390]. In denying Defendants' petition for rehearing en banc, the Ninth Circuit (1) upheld the  
 21      discovery sanction imposed against Defendants, (2) upheld the Court's conclusion that Defendant  
 22      Vachani is personally liable for all CFAA and Penal Code Section 502 violations, and (3)  
 23      remanded the matter to this Court solely "to reconsider appropriate remedies under the CFAA and  
 24      Section 502, including any injunctive relief." *Facebook, Inc. v. Power Ventures, Inc.*, No. 13-  
 25      17154, slip op. at 21-22 (9<sup>th</sup> Cir. Dec. 9, 2016). The Court of Appeals instructed, "With respect to  
 26      damages, the district court shall calculate damages only for the period after which Power [on  
 27      December 1, 2008] received the cease and desist letter, when Power continued to access data  
 28      contained in Facebook's servers and memory banks." *Id.* at 22. No other issues remain for the

1 Court's resolution.

2 **1. The Court's Prior Award of \$80,543 in Damages for CFAA and Penal**  
**Code Section 502(b) Violations Can Be Reinstated**

3 Facebook previously established through undisputed testimony from both its outside  
 4 counsel, its security expert assigned to respond to Defendants' violations, and its damages expert  
 5 witness, that it expended \$80,543 on or after December 1, 2008, as a result of its internal and  
 6 external investigations and implementing technical measures that served as the basis for its CFAA  
 7 and Penal Code Section 502(b) claims. *See* Dkt. No. 299-25 (Expert Report of Damages Expert  
 8 Richard Ostiller), ¶¶ 13-29 & Schedule 1<sup>2</sup>; *see also* Dkt. No. 213-4 (Declaration of Facebook  
 9 Security Manager Ryan McGeehan), ¶¶ 7-18 (reflecting that his investigation of Defendants'  
 10 activities in connecting to the Facebook site began on December 1, 2008, and that all actions  
 11 taken to attempt to prevent Defendants' further connections to the site, including imposition of IP  
 12 blocks, occurred after Facebook served the cease and desist order); Dkt. No. 213-2 (Declaration  
 13 of Facebook Attorney Joseph Cutler), ¶¶ 4-15 (describing Perkins Coie's legal work in  
 14 December 2008 and early 2009). Further, as this Court itself noted, "Defendants do not dispute  
 15 the accuracy or veracity of [the] evidence of [Facebook's] expenditures." Dkt. No. 275, at 8.

16 Paragraphs 21, 30 and Schedule 1 of the Expert Report of Richard Ostiller reflect that in  
 17 addition to \$5000 in internal damages sustained by Facebook in December 2008 in employing its  
 18 Security Manager Ryan McGeehan to respond to Power's attempts to circumvent IP blocks,  
 19 Facebook incurred \$36,824 in CFAA and Penal Code Section 502 damages as a result of  
 20 payments to outside counsel Perkins Coie for the months of January through March, 2009. *See*  
 21 Dkt. No. 299-25, ¶¶ 21, 30 & Schedule 1. Additionally, paragraph 15 of the Declaration of Joseph  
 22 Cutler reflects he personally billed Facebook \$5059 in legal fees for his activities in December of  
 23 2008. This reflects that Facebook sustained \$46,883 in damages from Defendants for the period  
 24 after December 1 2008, and hence satisfies the Ninth Circuit's criteria for an adjusted award from

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26 <sup>2</sup> The full Expert Report of Facebook's Damages Expert Richard Ostiller was served on  
 Defendants and lodged, but not filed, with the Court on December 19, 2011 pursuant to Chief  
 Judge Ware's Case Management Order. *See* Dkt. No. 92, ¶ 4. In the event that this Court  
 requests that report now to be filed with the Court rather than lodged, Facebook does not object.  
 A portion of the Report was filed under seal as Dkt. No. 299-325, and later unsealed as Dkt.  
 No. 300.

1 the \$80,543 originally awarded in damages for violation of the CFAA and Penal Code Section  
 2 502.

3 **2. The \$89,434.66 Previously Awarded for Discovery Sanctions and Costs**  
**Remain Undisturbed**

4 The Ninth Circuit upheld this Court's prior award of \$39,796.73 in sanctions against both  
 5 Power and Vachani relating to their discovery abuse in conjunction with a Rule 30(b)(6)  
 6 deposition at which Vachani failed to provide adequate answers to questions, and then failed to  
 7 produce highly relevant documents until after the conclusion of discovery. *Facebook, Inc. v.*  
 8 *Power Ventures, Inc.*, No. 13-17154, slip op. at 22 (9<sup>th</sup> Cir. Dec. 9, 2016). Accordingly, the  
 9 Judgment on remand should once again include the \$39,796.73 sanction award previously  
 10 awarded against both Power and Vachani to Facebook. Likewise, inasmuch as the \$49,637.93 in  
 11 costs that the Court awarded Facebook also was not challenged on appeal, that award also should  
 12 be reinstated in the Judgment.

13 **3. The Permanent Injunction Need Only Remove Conditions Specifically**  
**Related to CAN-SPAM Violations, and Be Amended To Ensure**  
**Proper Compliance by Defendants**

14 Facebook's proposed Permanent Injunction modifies and simplifies the earlier Permanent  
 15 Injunction to delete all elements of relief that were specific to CAN-SPAM violations, while also  
 16 ensuring that Defendants have already complied with its terms.

17 **C. Defendants' Position**

18 As noted in footnote 1, *supra*, Defendants were not able to provide Facebook with their  
 19 positions by the deadline to file this Joint Case Management Statement.

20 **III. LEGAL ISSUES**

21 **A. Facebook's Position**

22 The only legal issues remaining in this action are the following:

23 **1.** What amount of damages should be awarded to Facebook for Defendants'  
 24 violations of the CFAA and California Penal Code Section 502, for the  
 25 period on and after December 1, 2008, when Defendants received the cease  
 26 and desist letter notifying them of their violations of the Acts?

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1                   2.     What should be the scope of permanent injunctive relief arising from  
2                   Defendants' unlawful actions?

3                   **B.     Defendants' Position**

4                   As noted in footnote 1, *supra*, Defendants were not able to provide Facebook with their  
5                   positions by the deadline to file this Joint Case Management Statement. Facebook understands  
6                   instead that Defendants will be seeking a continuance of the Case Management Conference.

7                   **IV.    MOTIONS**

8                   **A.     Pending Motions**

9                   There are no pending motions filed by the Parties.

10                   **B.     Anticipated Motions**

11                   **1.     Facebook's Position**

12                   Facebook believes the Court already is in position to enter an award of damages and an  
13                   order granting permanent injunctive relief in the proposed draft form it provides with this Joint  
14                   Case Management Statement. Facebook does not anticipate filing any additional motions, but is  
15                   prepared to further brief the remanded issues, should the Court so desire.

16                   **2.     Defendants' Position**

17                   As noted in footnote 1, *supra*, Defendants were not able to provide Facebook with their  
18                   positions by the deadline to file this Joint Case Management Statement.

19                   **V.     AMENDMENT OF PLEADINGS**

20                   The case is now fully at issue.

21                   **VI.    EVIDENCE PRESERVATION**

22                   **A.     Facebook's Position**

23                   To the extent the issue is relevant in the wake of the Ninth Circuit's remand Order,  
24                   Facebook has taken appropriate measures to preserve relevant evidence. Facebook has reviewed  
25                   the Guidelines Relating to the Discovery of Electronically Stored Information and that parties  
26                   have met and conferred pursuant to Fed. R. Civ. P. 26(f) regarding reasonable and proportionate  
27                   steps taken to preserve evidence relevant to the issues reasonably evident in this action.

1                   **B. Defendants' Position**

2                   As noted in footnote 1, *supra*, Defendants were not able to provide Facebook with their  
 3 positions by the deadline to file this Joint Case Management Statement.

4                   **VII. INITIAL DISCLOSURES**

5                   Facebook served its initial disclosures on Defendants on July 29, 2011. Facebook served  
 6 its supplemental and second supplemental initial disclosures on Defendants on October 14, 2011  
 7 and January 13, 2012, respectively. Defendants served their initial disclosures on Facebook on  
 8 August 15, 2011. To date, Defendants have not supplemented the initial disclosures.

9                   **VIII. DISCOVERY**

10                  Discovery closed on January 20, 2012. The parties agree that no additional discovery is  
 11 necessary at this time.

12                  **IX. CLASS ACTIONS**

13                  This is not a class action case.

14                  **X. RELATED CASES**

15                  Vachani's bankruptcy proceeding in the United States Bankruptcy Court for the Northern  
 16 District of California, Oakland Division, Case No. 12-47150 RLE 13, is related to this matter.  
 17 The Bankruptcy Court has by Order dated February 13, 2013 [Dkt. No. 122] granted Facebook  
 18 relief from the automatic stay imposed by 11 U.S.C. § 362(a), in order "to permit Facebook to  
 19 take any and all actions necessary and appropriate to cause the reopening and completion of [this  
 20 District Court action]...."

21                  **XI. RELIEF**

22                  Facebook prays for injunctive relief and the monetary damages set forth in its Proposed  
 23 Judgment and Permanent Injunction. The bases for Plaintiff's request for monetary damages  
 24 include compensatory, statutory, and attorneys' fees permitted by law, and upheld by the Ninth  
 25 Circuit as appropriate in this case.

26                  **XII. SETTLEMENT AND ADR**

27                  The parties engaged in an ADR mediation session on December 14, 2009. The session  
 28 was facilitated by mediator Daralyn Durie, who has filed papers with the Court indicating that the

1 ADR process is not yet complete and that further facilitated discussions are expected. *See* Dkt.  
2 No. 59. To date, the parties have engaged in numerous settlement discussions, but have been  
3 unable to reach resolution. The latest of these settlement discussions was on or around April 26,  
4 2013.

5 **XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

6 The parties have not consented to a magistrate judge.

7 **XIV. OTHER REFERENCES**

8 **A. Facebook's Position**

9 Facebook does not believe any additional references are necessary at this time.

10 **B. Defendants' Position**

11 As noted in footnote 1, *supra*, Defendants were not able to provide Facebook with their  
12 positions by the deadline to file this Joint Case Management Statement.

13 **XV. NARROWING OF ISSUES**

14 Facebook does not believe that the remaining issues can be narrowed at this time,  
15 inasmuch as liability already has been established and upheld by the Ninth Circuit.

16 **XVI. EXPEDITED TRIAL PROCEDURES**

17 An expedited schedule is not necessary in this case.

18 **XVII. SCHEDULING**

19 Facebook believes the matter already is positioned for entry of a final Judgment and  
20 Permanent Injunction, in the form proposed by Facebook.

21 **XVIII. TRIAL**

22 No trial is necessary. This Court has already found that the damages amounts are  
23 unrebutted.

24 **XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES AND PERSONS**

25 Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the  
26 named parties, there is no such interest to report.

1       **XX. OTHER MATTERS**

2           None.

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4           Dated: January 4, 2017

ORRICK, HERRINGTON & SUTCLIFFE LLP

5           */s/ Monte M.F. Cooper*

6           MONTE M.F. COOPER  
7           Attorneys for Plaintiff  
FACEBOOK, INC.

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